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U.S. DEPARTMENT OF ENERGY ACCESS TO CENTURY-FARMS, INC. PROPERTY NEAR FERNALD, OHIO

08/24/90

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DOE-FMPC/MEBS, ALTMAYER &
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LETTER
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Department of Energy
FMPC Site Office
P.O. Box 398705
Cincinnati, Ohio 45239-8705
(513) 738-6319

AUG 2 4 1990
DOE-1785-90

Frederick W. Mebs
Mebs, Altmayer and Von Hagen
American Building Suite 610
30 E. Central Parkway
Cincinnati, Ohio 45202

Dear Mr. Mebs:

U. S. DEPARTMENT OF ENERGY ACCESS TO CENTURY-FARMS, INC. PROPERTY NEAR FERNALD, OHIO

This summarizes our telephone conversation on August 7, 1990 concerning the U. S. Department of Energy's (DOE) request for entry and access to Century-Farms, Inc. property near Fernald, Ohio. DOE is requesting the consent of Century Farms, Inc. for entry and access to gather information under Section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U. S. C. § 9604(e). Specifically, DOE wishes to install groundwater monitoring wells to gather information for its remedial investigation and feasibility study (RI/FS). DOE is conducting the RI/FS under CERCLA, the National Contingency Plan (NCP), and a consent agreement with the United States Environmental Protection Agency (EPA). I have enclosed a copy of the CERCLA consent agreement governing the RI/FS.

Century Farms, Inc. voluntarily consents to DOE's entry and access for the limited purposes of measuring or sampling water quality in existing wells on the property. I have enclosed a revised form reflecting Century Farms Inc.'s consent to entry and access to existing wells. Century Farms, Inc. does not agree, yet, to the installation of new groundwater monitoring wells unless DOE compensates Century Farms, Inc. for any loss of property value (or perceived loss of property value) resulting from the installation of the proposed wells. DOE does not agree that compensation is appropriate in this matter and requests that Century Farms, Inc. reconsider DOE's request to install wells.

Section 104(e) of CERCLA, 42 U. S. C. § 9604(e) authorizes the United States to enter places or property when necessary to determine the need for response under CERCLA. This authority have been delegated to DOE where the release is from a DOE facility. DOE's preliminary data shows that uranium released

from the FMPC moved into the groundwater south of the FMPC. Consequently DOE is investigating the groundwater contamination south of the FMPC to decide what, if any, response actions are needed to protect public health and the environment. The groundwater monitoring wells that DOE is proposing to install on Century Farms, Inc. property are part of this investigation which has been approved by EPA under the enclosed consent agreement. For these reasons, the DOE's access request falls squarely within the statutory authority.

DOE does not agree that entry and access for purposes of well installation results in any property loss (or perceived property loss) to Century Farms, Inc. Section 104(e) of CERCLA entitles DOE to access when carrying out CERCLA response activities, like the RI/FS presently being conducted under the enclosed consent agreement. CERCLA does not mandate compensation to property owners as a precondition to entry and access under Section 104(e). DOE does not agree that compensation is (or should be) a precondition to carrying out its obligations under CERCLA. If Century Farms, Inc. believes that a claim for compensation (or damages) may result from DOE's response actions (i. e., well installation), that claim should be pursued under the Tucker Act, 28 U. S. C. § 1491.

At this time, DOE is seeking access under its statutory authority solely for purpsoes of conducting a CERCLA investigation which has as its express purpose the protection of the public health and the environment. For these reasons, DOE asks that Century Farms, Inc. reconsider its request for entry and access to install groundwater monitoring wells.

Please call me at (513) 738-6656 if you wish to further discuss this matter.

Sincerely yours,

Elizabeth L. Osheim

Elizabeth L. Osheim
FMPC Legal Counsel

Enclosures: As stated

DOE F 1325.8
(5-83)

United States Government

Department of Energy

Oak Ridge Operations

memorandum

AUG 28 1990

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DATE: DOE-1804-90

REPLY TO ATTN OF: DP-84:Osheim

SUBJECT: **Civil Judicial Referral For Access Under Section 104(e) of CERCLA - Century Farms, Inc.**

TO: Marc Johnston, Acting General Counsel for Litigation, GC-22, FORS

The Feed Materials Production Center (FMPC) requests that the United States Department of Justice (DOJ) file a civil action pursuant to Section 104(e)(5) of the Comprehensive Environmental Response, Compensation and Liability Action of 1980 (CERCLA), as amended, 42 U.S.C. § 9604(e)(5) to seek an Immediate Order in Aid of Access granting the United States Department of Energy (DOE) and its authorized representatives access to the property owned by Century Farms, Inc., in Hamilton County, Ohio. The order is needed to gain entry and access to install and, thereafter, sample groundwater monitoring wells to delineate off-site groundwater contamination associated with releases of hazardous substances from the FMPC. The information obtained from the wells will be used in a remedial investigation and feasibility study (RI/FS) being conducted under a CERCLA Consent Agreement with the United States Environmental Protection Agency (EPA). The RI/FS will determine the need for remedial actions under CERCLA. Century Farms, Inc. has refused to give its permission to DOE to enter its property for the above purposes.

A litigation report is attached to this memorandum. A copy of this memorandum, together with the attached litigation report, has been sent to DOJ in order to expediate review of the case. This referral meets an EPA-mandated deadline under Section XXVIII of the CERCLA Consent Agreement.

Please call me at FTS 774-6656 if you have any questions on this matter.

Elizabeth L. Osheim

Elizabeth L. Osheim
FMPC Legal Counsel

Attachment: As stated

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cc w/att.:

L. P. Duffy, EM-1, FORS
T. Russell, GC-21, FORS
W. P. Snyder, CC-10, ORO
J. Gross, DOJ, Environmental Enforcement Section
J. Steven Rogers, DOJ, Division Counsel for
Federal Environmental Compliance

cc w/o att.:

P. Q. Andrews, U.S. EPA-V

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L I T I G A T I O N R E P O R T

C E N T U R Y F A R M S , I N C .

C E R C L A A C C E S S R E F E R R A L

August 27, 1990

Elizabeth Osheim
U.S. Department of Energy
FMPC Legal Counsel
P. O. Box 398705
Cincinnati, Ohio 45239
FTS 774-6656

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DATA SHEET

1248

REQUEST FOR CIVIL ACTION: Complaint For Access and Motion For An Immediate Order In Aid Of Access

SITE: Feed Materials Production Center (FMPC)

STATUTORY PROVISION: Section 104(e)(5) of CERCLA
42 U.S.C. § 9604(e)(5)

JURISDICTION: Southern District of Ohio
Western Division

RECOMMENDED DEFENDANT: Century Farms, Inc.
4290 Carthel Dr.
Hamilton, Ohio 45011
Dr. John F. Moore, President
David Brate, General Manager

REGISTERED AGENT FOR SERVICE OF PROCESS:

Frederick W. Mebs
1027 Temple Bar Bldg.
Cincinnati, Ohio 45202

ATTORNEY: Frederick W. Mebs
Mebs, Altmayer and Von Hagen
American Building, Suite 610
30 E. Central Parkway
Cincinnati, Ohio 45202
(513) 721-3114

ACTION REQUESTED: File in district court a Complaint for Access, and a Motion for an Immediate Order in Aid of Access, granting the U.S. DOE and its authorized representatives entry and continued access to property owned by Century Farms, Inc., and located in Hamilton County, Ohio, to conduct an investigation into the nature and extent of groundwater contamination under defendant's property associated with releases of hazardous substances from the FMPC. Century Farms, Inc. has refused entry to U.S. DOE for the above purposes.

BASIS FOR ACTION: 28 U.S.C. §§ 2201 and 2202 42 U.S.C.§ 9604(e)

RELIEF REQUESTED: (1) An immediate order in aid of access; and
(2) A declaration that U.S. DOE has a legal right to access under CERCLA for the purposes and to extent provided under Section 104(e).

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I. SYNOPSIS OF THE CASE

The U.S. Department of Energy (U.S. DOE) is seeking an Immediate Order in Aid of Access against Century Farms, Inc. to enable U.S. DOE and its authorized representatives to enter upon (and have continued access to) property owned by Century Farms, Inc. to take response actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended, 42 U.S.C. § 9601, et seq. The response actions to be conducted on Century Farms, Inc.'s property consist of the installation and continued sampling of groundwater monitoring wells. These wells are needed to investigate off-site groundwater contamination associated with releases of hazardous substances from the U.S. DOE's Feed Materials Production Center (FMPC) at Fernald, Ohio. The investigation is part of U.S DOE's remedial investigation and feasibility study (RI/FS) approved by the U.S. Environmental Protection Agency (EPA) under a 1990 CERCLA Consent Agreement. The RI/FS is necessary to determine the extent of the dangers created by releases of hazardous substances from the FMPC to off-site groundwater (referred to as the "South Plume") and to determine what, if any, remedial measures are necessary to respond to those dangers for the protection of public health and the environment. Entry and access is authorized by Section 104(e) of the CERCLA, 42 U.S.C. § 9604(e).

A civil action is necessary to obtain entry and access because Century Farms, Inc. has refused to give permission to U.S. DOE and its authorized representatives for entry and access to its property for these purposes. Until such time as entry and

access is granted, U. S. DOE's remedial investigation will be 1248 incomplete. Time is of the essence because further delay in entry and access may endanger the schedule for groundwater monitoring and result in a loss of seasonal flow data from wells at this location. Further delays in obtaining entry and access could adversely affect the RI/FS schedule agreed to under the Consent Agreement. The Consent Agreement schedule is enforceable against U.S. DOE under Section XVI ("Enforceability") and Section XVII ("Stipulated Penalties") of the Agreement. Violations of the Agreement may also result in action against U.S. DOE under Sections 310(c) and 109 of CERCLA.

II. SIGNIFICANCE OF THE REFERRAL

A. Judicial Exercise of CERCLA Access Authority

This is U.S. DOE's first referral to DOJ for appropriate judicial process under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e) and Executive Order 12580. Section 104(e) of CERCLA authorizes the United States to enter places and property for purposes of investigating and responding to releases of hazardous substances. As amended, Section 104(e)(1) provides that any duly authorized representative of the President has the right of access to places and property for the broad purposes "of determining the need for response, or choosing or taking any response action under this title, . . ." 42 U.S.C. § 9604(e)(1). The President has delegated his investigatory, response, and entry authorities under Section 104 to the appropriate federal agency where the sole-source of the release is from a federal facility. Executive Order No. 12580, 52 Fed. Reg. 2925 (1987). When access is being sought under Section 104(e)(5) (that is,

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through civil action to compel compliance with an access request), the authority must be exercised with the concurrence of the Attorney General of the United States. This case would establish procedures within U.S. DOE to exercise its access authority when needed in the future.

This case could also establish a valuable site-specific precedent. It may put an end to demands for money in exchange for permission to install wells in connection with the Fernald RI/FS. The past practice at the FMPC has been to offer consideration (e.g., $50 per well per month) to property owners to obtain access. This practice evolved because the FMPC's Management and Operating (M & O) contractor was tasked with obtaining access agreements. The contractor (lacking U.S. DOE's statutory access authority) offered money as consideration for the agreements. In this case, however, the Century Farms, Inc. demanded more money from the M & O contractor than had been given other landowners. U.S. DOE now makes its own access requests (unless there is a pre-existing agreement between the landowner and the M & O contractor). U.S. DOE has refused all requests for compensation as a precondition to the exercise of its statutory access authority under CERCLA. This approach is consistent with U.S. EPA and DOJ policy not to accept preconditions when exercising CERCLA's access authority. Finally, in this case, if the M & O contractor were to pay Century Farms, Inc. more money than previous landowners received, it may constitute a basis for reopening a settlement agreement in Albright & Wilson,Americas, Inc. v. NLO, Inc., et al., Civ. C-1-89-035 (S.D. Ohio) and require renegotiation of pre-existing agreements. Therefore,

this action may help end future demands for money in exchange for installation of groundwater monitoring wells. This would facilitate U.S. DOE's ability to gain access in a timely manner to off-site property when necessary for the RI/FS.

B. CERCLA Consent Agreement Compliance

This case fulfills an enforceable commitment made by U.S. U.S. DOE in Section XXVIII ("Access") of the CERCLA Consent Agreement for the FMPC. EPA complains that DOE's persistent failure to exercise its CERCLA access authorities has resulted in delays under the 1986 Federal Facility Compliance Agreement (FFCA) and under the 1990 Consent Agreement. This case would show a good faith effort to comply with the Consent Agreement and demonstrate to EPA that U.S. DOE is willing to take the necessary action to comply with its RI/FS schedules.

In the 1990 CERCLA Consent Agreement, U.S.DOE agreed to exercise its Section 104(e) access authorities to the extent required to obtain access to off-site properties "to assure timely performance" of its obligations under the Consent Agreement. Specifically, U.S. DOE agreed that,

> In the event voluntary access has not been obtained by U.S. DOE within thirty (30) days of the approval of any work plan, EE/CA, or proposal, whichever is earliest, that requires access to properties not owned or leased to U.S. DOE, U.S. DOE agrees within the next thirty (30) days to refer the matter to the U.S. Department of Justice for the appropriate judicial process . . . to assure timely performance of U.S. DOE's obligations under this agreement."

In this case, EPA mandated referral of this case to DOJ no later than August 29, 1990. Consequently, this litigation report also fulfills an obligation under the CERCLA Consent Agreement. Without this referral, EPA considers U.S. DOE to be in violation

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of Section XXVIII of the Consent Agreement.

III. STATUTORY BASIS OF REFERRAL

A. Applicable Statute/Legal Theory

Section 104(e)(1) of CERCLA authorizes U.S. DOE and its authorized representatives to enter property to conduct response activities when "there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant." 42 U.S.C. § 9604(e)(1). CERCLA defines "release" broadly. Section 101(22) of CERCLA, as amended, states in pertinent part: "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." 42 U.S.C. §9601(22). Thus, "release" may include practically any conceivable escape of a hazardous substance into the environment. A "threat of release" is, accordingly, any condition with the potential to result in a release of hazardous substances. "Hazardous substance" is defined to include substances listed as hazardous under CERCLA and chemicals identified as hazardous under a number of other federal environmental pollution statutes. 42 U.S.C. § 9601(14). EPA codified a comprehensive list of CERCLA hazardous substances at 40 C.F.R. § 302.4. Finally, "environment" is defined as "navigable waters . . . and any other surface water, groundwater, drinking water supply, land surface or subsurface strata, or ambient air within the United States." 42 U.S.C.§ 9601(8).

Once the United States determines that grounds exist for entry, its rights to entry and access are far-reaching. Section 104(e)(3) authorizes U.S. DOE (and its authorized

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representatives) to enter "any property where any hazardous substance may be or has been generated, stored, treated, disposed of, or transported from . . . released . . . or where such release is or may be threatened . . . or where entry is needed to determine the need for response . . . or to effectuate a response action under this title." 42 U.S.C. § 9604(e)(3)(A)-(D). Section 104(e) also provides the mechanisms by which U.S. DOE may enforce its access authority. Under Section 104(e)(5), if consent is denied, U.S. DOE may proceed to federal district court, as requested in this case, to enforce its request for access 42 U.S.C. § 9604(e)(5)(B). Finally, the standard of review to be applied by the district court in reviewing requests for access is narrow and presents few issues. Section 104(e)(5)(B) provides:

> Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:
> (i) In the case of interference with entry or inspection, the court shall enjoin such interference . . . unless under the circumstances of the case the demand for entry or inspection is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The decisions under, and the legislative history of, Section 104(e) show that, (a) if elements relating to purpose and place are met, the sole issue in an action to enforce a request for entry is whether the United States (in this case, U.S. DOE) had a reasonable basis to believe there was a release or threatened release, and (b) in reviewing the release determination, the court is to apply the arbitrary and capricious standard. Review under Section 104(e), relating to access, does not open up the response action itself, to judicial relief.

Rather, only the President's reasonable belief that there had been a release or threatened release is subject to review. Cong. Rec. H9582 (October 8, 1986)(Statement of Rep. Glickman); see also Cong. Rec. S14929 (Oct. 3, 1986) (Statement of Sen. Thurmond) ("In actions to compel access, the court may only review whether the Agency's conclusion that there is a release or threatened release of hazardous substances is arbitrary and capricious.") United States v. Western Processing, Civ. No. C83-252M, slip op. (W.D. Wash., Nov. 3, 1986) at 5. See also e.g., United States v. Long, No. C-1-87-167 slip op. (S.D. Ohio May 13, 1987); United States v. Dickerson, 640 F. Supp. 448 (D.M. Ga. 1986) at 977.

B. Jurisdiction and Venue

The federal district court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. §§ 1331 and 1345, 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. 9604(e) and 9613(b). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202. Venue is proper in the southern district of Ohio (Western Division) under 28 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b), because the release occurred in this District and the subject property is located within this District. Century Farms, Inc. also has its principal place of business in this District.

IV. FACTUAL BACKGROUND OF THE CASE

A. Basis For The Release Determination

When there is a reasonable basis to believe that there may be a release or threatened release of hazardous substances, CERCLA provides representatives of the President with unfettered access to broadly defined categories of property to take any

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response action. As long as U.S. DOE meets the threshold requirements of Section 104(e)(5) and its action is not arbitrary or capricious, the district court is required to enjoin any interference with U.S. DOE's entry to the property. The express language of Section 104(e) places no condition on the government's access.

On November 21, 1989, the FMPC was placed on the EPA's National Priorities List (NPL) promulgated under Section 105 of CERCLA, 42 U.S.C. § 9605. The NPL site is located on 1050 acres in rural Hamilton and Butler Counties, Ohio. The FMPC used a variety of chemical and metallurgical processes during its more than thirty years of manufacturing uranium products. Large quantities of liquid and solid wastes were generated by various operations during production. These materials were stored or disposed of at various locations on-site, including, among other areas, six low-level waste storage pits, concrete silos, and fly ash piles. Surface water runoff from these and other areas within the western portion of the FMPC can enter Paddys Run, a tributary of the Great Miami River. Paddys Run originates just north of the FMPC and intermittently flows south-southeast along the western edge of the site. Leachate from these areas can potentially migrate vertically into the regional Great Miami Aquifer which underlies the site. This aquifer serves as the principal source of domestic, municipal, and industrial water throughout the region. Liquid wastewater from various production and sanitary treatment facilities at the FMPC is discharged to the Great Miami River.

Elevated levels of uranium have been recorded as early as

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1981 in groundwater south of the FMPC. This area is referred to as the "South Groundwater Contamination Plume." Historic data and data from U.S. DOE's present groundwater monitoring evidences releases (and continued migration) of uranium into the groundwater south of the FMPC. Current data indicate that two distinct areas of elevated uranium concentrations exist in the south plume beneath the FMPC and adjacent off-site areas. Uranium is a hazardous substance under Section 101(14)(E) of CERCLA because it is a hazardous air pollutant listed under Section 112 of the Clean Air Act. The south plume (both on and off-site) contains soluble uranium.

B. U.S. DOE's Remedial Site Investigation

In 1986 U.S. DOE entered into an FFCA with EPA to investigate and respond to these releases. The FFCA was superseded in 1990 by a CERCLA Consent Agreement. EPA has approved various work plans and proposals under these agreements for U.S. DOE's investigation of the nature and extent of contamination in the south plume. The investigations are part of a larger RI/FS being conducted to determine final remedial measures for the groundwater and other portions of the site. As part of these investigations, groundwater monitoring wells have been installed both on and off-site. Analytical data obtained from samples from these wells are used to evaluate the extent and magnitude of the uranium plume and to determine if other radionuclides or chemicals are present in the plume. The extent and distribution of uranium in the south plume is delineated by combining these data with the results of a groundwater flow/solute transport model.

C. Relation of Century Farms, Inc.'s Property to Release

The land owned by Century Farms, Inc. is located in Hamilton County, Ohio. Century Farms, Inc.'s property is located approximately two (2) miles south and downgradient of the FMPC. This property is believed to be at the leading edge of the south plume. Based on a flow/solute transport model and data from wells installed on property located near and upgradient of Century Farms, Inc., U.S. DOE believes that uranium has migrated into the groundwater beneath Century Farms, Inc.'s property. Consequently, U.S. DOE determined that it was necessary to obtain samples of groundwater beneath Century Farms, Inc.'s property (and surrounding areas) to ascertain the full extent of any contamination in this area. This data will also allow U.S. DOE to project the rate and future movement of contaminants into other areas.

In December 1989, U.S. DOE submitted a proposal for the location of additional groundwater monitoring wells to further evaluate the south plume. Among the wells contained in that proposal was a groundwater monitoring well proposed to be located on Century Farms, Inc. property. EPA approved this proposal during a meeting on January 30, 1990. On May 15, 1990, U.S. DOE submitted another proposal that included a second proposed well on Century Farms, Inc. property. This proposal was approved by EPA on June 14, 1990. All well locations are selected by a hydrogeologist based upon his knowledge of the rate and movement of the plume and approved by EPA.

Between January and March, 1990, U.S. DOE's M & O contractor attempted to negotiate a licensing agreement with

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Century Farms, Inc. for access to Century Farms, Inc.'s property to install six wells. These negotiations were unsuccessful because of Century Farms, Inc.'s monetary demands. Because an access agreement was not obtained by the M & O contractor, U.S. DOE formally requested entry and access on May 25, 1990, pursuant to its statutory authority under CERCLA. U.S. DOE's request for entry and access included a request for entry to measure or sample existing irrigation wells on the Century Farms, Inc. property in addition to installing new wells. Century Farms, Inc. has agreed to permit U.S. DOE to sample/measure its existing irrigation wells. Century Farms, Inc., however, has refused to permit entry to install new wells for the RI because it believes that the installation of new wells may result in a real or perceived property loss. Therefore, it requests compensation as a precondition to entry and access. U.S. DOE has responded that compensation is not appropriate because it has specific statutory authority to enter property to investigate hazardous substance releases under CERCLA. U.S. DOE also advised Century Farms, Inc. that any claims for compensation or damages may be pursued against the United States under the Tucker Act, 28 U.S.C.§ 1491. Copies of correspondence with Century Farms, Inc. will be provided with draft pleadings.

Because U.S. DOE has failed, over the past three months to obtain voluntary consent to install wells on Century Farms, Inc. property, EPA has set a deadline of August 29, 1990 for U.S. DOE to refer the matter to DOJ for civil action under Section 104(e) of CERCLA.

V. RELIEF REQUESTED

U.S. DOE is seeking the following judicial relief:

(1) an immediate order in aid of access enjoining Century Farms, Inc. from obstructing or interfering with U.S. DOE or its authorized representatives, specifically employees of U.S. DOE's contractors (WMCO,ASI) and their subcontractors (IT, Penn Drilling), from entry to the Century Farms, Inc. property for purposes installing groundwater monitoring wells and continued sampling/monitoring of those wells for the duration of the RI/FS;

(2) a declaration pursuant to 28 U.S.C. §§ 2201 and 2202 that U.S. DOE has the legal right to enter the Century Farms, Inc. property for the purposes and to the extent provided in Section 104 of CERCLA and to perform such monitoring, analyses, testing and other investigations as are authorized by those statutory provisions; and

(3) such other and further relief as the Court may deem appropriate.

VI. ELEMENTS OF THE CASE

U.S. DOE will be required to demonstrate the following statutory criteria to show that it is entitled to an immediate order in aid of access:

(1) a reasonable basis for the determination that a "release" or "threatened release" of a "hazardous substance" from a "facility" into the "environment" has occurred, and

(2) the need for entry to take, or effectuate, response actions, and to choose response actions or determine the need for future response under CERCLA, and

(3) the refusal of Century Farms, Inc. to permit U.S. DOE entry to perform the statutorily-authorized activities.

A. Reasonable Basis For Release Determination

U.S. DOE can clearly demonstrate that it is entitled to access under Section 104(e) for the purpose of implementing appropriate response actions and determining the need for future response actions. U.S. DOE can establish (with affidavits from its Remedial Project Manager and a hydrogeologist) that there is a reasonable basis to believe that there may be a release or threatened release of a hazardous substance (uranium) from the

FMPC into the environment (i.e., the south plume). The RI/FS and other preliminary data amply document the fact that uranium has been released into the surrounding environment at the FMPC. The data strongly suggest that the groundwater beneath the FMPC and surrounding properties (including those owned by Century Farms, Inc.) south of the FMPC has been contaminated as well by uranium releases from the facility. Clearly, it is reasonable to conclude from the investigations to date that there has been a release of hazardous substances from U.S. DOE's facility into the environment.

B. Need For Entry To Effectuate Response Actions

Based on this data, U.S. DOE's decided that it needed to enter Century Farms, Inc.'s property for the purpose of installing monitoring wells to delineate the extent of the south plume.

The wells to be installed on Century Farms, Inc.'s property are an integral part of a series of monitoring wells strategically placed throughout the area to characterize the south plume. This decision is part of a larger ongoing RI/FS required and approved by EPA, first under an FFCA, and more recently, under a CERCLA Consent Agreement. Indeed, the specific well locations have been approved by EPA.

The Consent Agreement specifically requires U.S. DOE to perform investigative activities, including the installation of groundwater monitoring wells and the taking of samples from those wells. Installation of groundwater monitoring wells by U.S. DOE are clearly "response actions" under CERCLA, as these wells provide critical hydrogeological data to characterize this area

and groundwater contamination. See 42 U.S.C. § 9601(24), (25). The purpose of the RI is determine and choose future remedial actions necessary to protect public health and the environment. The hydrogeological data obtained from the RI will form the basis for the selection of remedial measures for the south plume. Under these facts, U.S. DOE's decision as to the need to enter Century Farms, Inc.'s property for purposes of installing groundwater monitoring wells can in no way be challenged as being either arbitrary or capricious. U.S. DOE's purposes fall squarely with the definition of "taking any response action," for which access is authorized under Section 104(e)(1) of CERCLA.

The Century Farms, Inc. property is of the type that the United States is authorized to enter under CERCLA. 42 U.S.C.§ 9604(e)(3)(D). Access to Century Farms, Inc.'s property is necessary "to effectuate [the] response action" at the FMPC site. The property is downgradient of the release and in the pathway of the release. Access to the property is also authorized because such entry is necessary to "determine the need for response," since contaminants have migrated beneath the Century Farms, Inc. property. 42 U.S.C. § 9604(e)(3)(C)-(D). See also, United States v. Charles George Trucking Co., 682 F. Supp. 1260 (D.Mass. 1988)(entry to an adjacent property authorized under Section 104(e) if necessary to effectuate a response).

Under the circumstances, the government's actions are not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. U.S. DOE is requesting access to fulfill its congressionally-mandated function under CERCLA to properly investigate the release of hazardous substances from the FMPC and

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to determine the need for response, or choose or take any [redacted] response action for the ultimate clean-up of the site. Moreover, U.S. DOE is doing so under an RI approved by EPA under a CERCLA Consent Agreement. The government's purpose here is to protect the public health and environment from further threats associated with the hazardous substances beneath its property and property adjacent to or downgradient from the FMPC.

C. Century Farms, Inc.'s Refusal to Permit Entry

Century Farms, Inc.'s refusal to permit entry is documented in correspondence to U.S. DOE. The attempts to gain consensual access are described in Sections II.A. and IV.C. of this litigation report.

VII. OTHER LEGAL ISSUES/POSSIBLE DEFENSES

A. Century Farms, Inc.'s Demand For Compensation

As discussed earlier, Century Farms, Inc. has asked for compensation for real or perceived property loss resulting from the proposed wells in exchange for access. Century Farms, Inc. can be expected to raise this claim in a civil action to compel access.

Defenses of compensation, damages or conditions on access are inappropriate in actions brought under Section 104(e) of CERCLA to compel access. Congress has created no provision in CERCLA mandating compensation to a property owner for entry by the United States or its authorized representatives for the purposes of conducting investigatory activities as authorized under Section 104(e), i.e., well installation for the RI. Indeed, the Congress explicitly authorized the President (and, the President has delegated to federal agencies, including U.S. DOE) -

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complete unreviewable discretion under Section 104(j), 42 U.S.C. § 9604(j) of CERCLA to consider compensation, among other options, when appropriate:

> Acquisition of property
>
> (1) Authority. The president is authorized to acquire, by purchase, lease, condemnation, donation, or otherwise, any real property or any interest in real property that the President in his discretion determines is needed to conduct a remedial action under this Act. There shall be no cause of action to compel the President to acquire any interest in real property under this Act . . . . A plain reading of the statute shows that Century Farms, Inc. has no statutory basis for demanding compensation from U.S. DOE as a condition of entry and access under Section 104.

B. "Takings" Defense

Any claim for compensation by Century Farms, Inc. may be presented (or construed by a court) as a request for just compensation for the "taking" of its property for public use under the Fifth Amendment to the United States Constitution. Generally, where the federal government performs an action specifically for the protection of the public health and safety which involves the use of private property or even significantly deprives the owner of the property for their personal or commercial use of the property, a taking has not occurred. Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 491-493, 107 S.Ct. 1232, 1244-1247 (1987). The RI/FS under Sections 104(e), 106, and 120 of CERCLA has as its express purpose the protection of the public health and safety as well as the environment.

However, assuming that Century Farms, Inc. might have a claim as to taking, such a claim is not property raised in an action to compel access under Section 104(e) of CERCLA. A claim

for compensation for a taking may only be pursued in the United States Court of Claims pursuant to the Tucker Act, 28 U.S.C. § 1491. Takings defenses have been rejected by courts in CERCLA actions. See, United States v. Charles George Trucking Co., 682 F. Supp. 1260 (D. Mass. 1988). See also, United States v. Dickerson, 640 F. Supp. 448, 451 (D. Md. 1986).

VIII. LITIGATION/SETTLEMENT STRATEGY

A. Recommended Strategy

The FMPC has asked Century Farms, Inc. to reconsider its demands for compensation and reconsider U.S. DOE's request for entry and access under Section 104(e). FMPC recommends that prior to filing the case, DOJ issue a "demand" letter reiterating U.S. DOE's request for entry and access. This will provide final opportunity to resolve the matter without litigation. U.S. DOE anticipates that litigation will be a lengthy process (even with the filing of an expedited motion for access). Therefore, it is searching for alternate locations for well installation (or other methods of obtaining the information) in order to minimize any impacts on the RI/FS schedule.

The FMPC is preparing draft pleadings, including a complaint for entry and access, a motion for an immediate order in aid of access and request for an expedited hearing, and the supporting memorandum and affidavits. These drafts, together with applicable correspondence, other supporting exhibits and information, will be provided shortly for evaluation of the case.

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CONSENT FOR ENTRY AND ACCESS TO PROPERTY

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Name: Century Farms, Inc.

Address of Property: Century Farms, Inc.
Paddy's Run Road
Fernald, Ohio

I consent to officers, employees, and authorized representatives of the United States Department of Energy (U.S. DOE) entering and having continued access to my property for the following purposes of taking of water samples or measurements of water levels from existing wells.

I also agree to notify U.S. DOE and U.S. EPA by certified mail, return receipt requested, at least thirty (30) days prior to any conveyance of the property on which the above wells are located of my intent to convey an interest in the property and of any provisions made for the continued access to the above-mentioned purposes.

I realize that these actions by U.S. DOE are undertaken pursuant to Executive Order 12580 which delegates authority to U.S. DOE to seek access in accordance with the provisions of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Sections 9601 et seq., as amended.

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[redacted]

This written permission is given by me voluntarily with knowledge of my right to refuse and without threats or promises of any kind.

_____ _____

Date Authorized Signature
Title